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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

IN RE PARIS AIR CRASH
OF MARCH 3, 1974

PLAINTIFFS IN MDL 172
DORIS LEAH KALINSKY, et al.,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION;
McDONNELL DOUGLAS CORPORATION.

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Panel correctly performed its task under Erie v. Tompkins, 304 U.S. 64, in deciding an issue of state law which the District Court previously decided?

2. Whether a distinction against punitive liability in death cases violates the equal protection standards of the California Constitution?

3. Whether a distinction against punitive liability in death cases violates the equal protection standards of the United States Constitution?

4. Whether a classification favoring homicide deserves the stricter scrutiny of suspect classifications?

5. Whether a court can interpret a death distinction to absolve from real liability a defendant who intentionally killed for the sake of legal advantage?

6. Whether the law creates an immunity from real liability for defendants who would plan plane crashes for profit?

II

PARTIES

The parties to an appeal before the Ninth Circuit Panel whose Opinion is sought to be reviewed are as follows:

1. General Dynamics Corporation; McDonnell Douglas Corporation, Appellants.

2. Plaintiffs in MDL 172; Doris Leah Kalinsky and Sol Kalinsky; and Geraldine L. Flanagan, Appellees.

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The District Court found the death distinction unconstitutional in that it denies the person injured by death equal protection of the law to establish exemplary liability for the purpose of deterence, and it shields the death defendant from that liability, for the sole reason that the defendant kills. All other injured persons can assert exemplary liability to deter wrongful acts.

The Court of Appeals REVERSED.

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In re Paris Air Crash of March 3, 1974 MDL 172, (1975) 399 F.Supp. 732: Re choice of California's law.

In re Paris Air Crash of March 3, 1974 MDL 172, (1975) 69 F.R.D. 310: Re separate consolidated trials on liability and compensatory damages

In re Paris Air Crash of March 3, 1974 MDL 172, (1976) 410 F.Supp. 326: Re punitive liability (first opinion).

In re Paris Air Crash of March 3, 1974 MDL 172, (1976) 423 F.Supp. 367: Re compensatory damages instructions.

In re Paris Air Crash of March 3, 1974 MDL 172, (1977) 427 F.Supp. 701: Re punitive liability (second opinion).*

Geraldine L. Flanagan, et al v. McDonnel Douglas Corporation, et al, (1977) 428 F.Supp. 770: Re statute of limitations and class action decertification.

In re Paris Air Crash of March 3, 1974 MDL 172, (1977) 428 F.Supp. 1074: Re suicide from grief not recoverable

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Re time for appeal where U.S. a party.

In re Paris Air Crash of March 3, 1974 MDL 172, Kalinsky et al v. McDonnell Douglas et al, (U.S.C.A. 9th Circuit 1979),

Re compensatory damages trial errors.

In re Paris Air Crash of March 3, 1974 McDonnell Douglas Corporation and General Dynamics Corporation v. Plaintiffs in MDL 172, (U.S.C.A. 9th Cir. 1980),

Re constitutionality of disallowance of punitive liability in death cases.
This is the opinion which is preventing a liability trial and from which this Petition is taken.

Final citations are not yet available.

VI

JURISDICTION

1. The date of the judgment or decree (the Opinion) sought to be reviewed is June 2, 1980. Its time of entry has not been indicated. See Appendix "A".

2. On July 29, 1980 the three-judge panel of the Court of Appeals voted to deny the petitions for rehearing, and no judge of the court has requested a vote on the suggestions for rehearing en banc. See Appendix "B".

3. On August 11, 1980 Judge Kennedy granted appellees' motion for stay of mandate pending the filing, consideration and disposition of the within Petition for Writ of Certiorari; such Pe-

tition to be filed by September 6, 1980. See Appendix "C".

4. The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree (the Opinion) in question by writ of certiorari is Title 28, section 1254, of the United States Code:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"
> * * *

5. There are special and important reasons for granting this petition in that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision:

a. The Court of Appeals pointedly refused to follow the Erie mandate and reach the same result as would a California court. See fn. 2 of the Opinion, Appendix "A". Erie v. Tompkins, (1938) 304 U.S. 64.

b. The Court of Appeals refused to give proper deference to the determination of California law by the two District Court judges from California. The Ninth Circuit panel was composed of two judges from Oregon and one from California. Scandinavian Airline System v. United Aircraft Corporation, (U.S.C.A. 9th Cir., 1979) repeated the Ninth Circuit's standard:

"* * * The analysis by the district judge of the law of the state in which he sits is entitled to great weight and his determination will be accepted on review, *unless shown to be clearly wrong*." *(Italics added)*

Counsel has found no cases otherwise.

6. The Court of Appeals has decided an important issue of federal law which has not been, but should be, settled by this Court. The degree of scrutiny to which a distinction favoring homicide should be subjected has not been decided by this Court. It should be decided in that this distinction against liability in death cases may actually be producing death from beneath the wing of this Court.

7. The basis for federal jurisdiction is diversity and amount in controversy. 28 U.S.C. § 1332.

Additionally, the United States is a party, 28 U.S.C. § 1346(b), and an alien is a party, Turkish Airlines, see 28 U.S.C. § 1332(a)(2); and potentially the Warsaw Convention, a treaty, was involved.

8. Pursuant to Rule 28.4(c) of the Rules of this Court, and this being the initial paper filed in this Court: 28 U.S.C. §2403(b) may be applicable in that the Opinion in question treats the distinction against punitive liability in death cases as having been created by statute. Opinion at page 3, line 16, through page 6, line 26.

The Opinion, however, also recognizes that this death distinction is based upon purely judicial interpretation. Opinion, fn. 2. Therefore, the constitutionality of neither the wrongful death statute, California Code of Civil Procedure § 377, nor the punitive damages statute, California Civil Code § 3294, has been drawn into question, although the judicial interpretation of the two has been questioned.

Pursuant to 28 U.S.C. 2403(b): counsel is not aware of any procedure by which this possible fact that the constitutionality of such statutes of the State has been drawn into question; and counsel is not aware that such has been attempted in this case.

Nevertheless, because the Ninth Circuit Panel has treated the distinction as having been created by statute, counsel has served a copy of this Petition upon the Attorney General of the State of California. See Certificate of Service.

VI

CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS INVOLVED

Page

UNITED STATES CONSTITUTION i, 32

Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF CALIFORNIA

Article 1, § 7 i, 32

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, [specific provisions relative only to pupil school assignment or pupil transportation]."

CALIFORINA CIVIL CODE, Sections:

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"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

§ 4 32

"*Rules of construction.* The rule of the common law, that statutes in derrogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

CALIFORNIA CODE OF CIVIL PROCEDURE, Sections:

Page

§ 4 [Identical to Civil Code § 4] 32

§ 27 31

"*Division of injuries.* An injury is of two kinds:

1. To the person; and,

2. To property."

§ 28 31

"*Injuries to property.* An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it."

§ 29 31

"*Injuries to the person.* Every other injury is an injury to the person."

§ 32 23

"*Civil and criminal remedies not merged.* When the violation of a right admits of both civil and criminal remedy, the right to prosecute the one is not merged in the other."

CALIFORNIA CODE OF CIVIL PROCEDURE,
Sections:

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§ 377 31,32, 33,43

"(a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in the case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section.

CALIFORNIA CODE OF CIVIL PROCEDURE,
Sections:

§ 377 (continued)

If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

(b) For the purposes of subdivision (a), 'heirs' mean only the following:

(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Division 2 (commencing with Section 200) of the Probate Code,

(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, 'putative spouse' means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(3) Minors, whether or not qualified under paragraphs (1) or (2), if, at the time of the decedent's death,

CALIFORNIA CODE OF CIVIL PROCEDURE,
Sections:

Page

§ 377 (continued)

they resided for the previous 180 days in the decedent's household and were dependent upon the decedent for one-half or more of their support.

Nothing in this subdivision shall be construed to change or modify the definition of 'heirs' under any other provision of law."

§ 1858 43

"Construction of statutes and instruments, general rule. In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provsions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

CALIFORNIA PROBATE CODE, Sections:

Page

§ 573 31

"Exept as provided in this section no cause of action shall be lost by reason of the death of any person but may be maintained by or against his executor or administrator.

In an action brought under this section against an executor or administrator all damages may be awarded which might have been recovered against the decedent had he lived except damages awardable under section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

When a person having a cause of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death, including any penalties or punitive, or exemplary damages that the decedent would have been entitled to recover if he lived, and shall not include damages for pain, suffering or disfigurement.

This section is applicable where a loss or damage occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not preceded or occurred simultaneously with the loss or damage.

CALIFORNIA PROBATE CODE, Sections:

§ 573 *(continued)*

Nothing in this section shall be construed as making assignable things in action which are of such a nature as not to have been assignable prior to the enactment of the 1961 amendment to this section."

VIII

STATEMENT OF THE CASE

The Statement of Facts set forth in the Kalinsky appellees' brief, and Addenda "A" and "B", have not been seriously disputed in this case. They are under seal before the Court and the record on appeal has been specifically augmented to include those two addenda.

Addendum "A", General Dynamics' Applegate Memorandum, "DC-10 Future Accident Liability," described the seriousness of its co-defendant's "band-aid fixes" which "not only failed to correct the inherent DC-10 catastrophic failure mode of cabin floor collapse but ... further degraded the safety of the original door latch system."

The problems were predicted to "usually result in the loss of the airplane." The loss of a DC-10 in this particular catastrophic failure mode means that every person on board would perish.

The writer assumed that correction would be made and concluded: "This corrective action becomes more expensive every day as production continues. However, it may well be less expensive than the cost of damages resulting from the loss of one plane load of people." He circulated his memo for the highest levels of management to take corporate action thereon.

They met and did nothing more than ask that the copies be returned to the writer who then destroyed all but one for his personal file. That copy has survived as Addendum "A".

On July 3, 1972, J.B. Hurt, General Dynamics' Program Manager for the DC-10 Support Program, wrote with further concern what has survived as Addendum "B". This memo began, "I do not take issue with the facts or concern expressed in the referenced memo," and concluded, "We have an interesting legal and moral problem ...."

Defense counsel have taken the position that meetings to discuss these memos are privileged in that at least one attorney was present.

There were two dress rehearsals, predictions of top level design engineers, and warnings from outside experts such as the Dutch equivalent of our FAA. But the defendants continued to manufacture, sell and represent the DC-10 as safe and airworthy.

On February 25, 1974, William C. Starloff, Douglas' FAA liason, made the final refusal to FAA requests of more than a year for relevant information about the problem. After stating that the FAA request should be clarified, that Douglas did not have the manpower available to undertake a study, and suggesting that the FAA consider funding a study, the letter concluded that Douglas would take no further action until it heard further from the FAA.

Which it soon did.

On March 3, 1974, six days after the refusal letter was sent to the FAA, a fully-loaded DC-10, en route from Paris to London, lost a cargo door. The resulting decompression of the cargo compartment failed the passenger floor downward, severing the control cables,

and causing the plane to crash, killing all three hundred and forty-six persons on board, an entire "plane load of people" exactly as predicted in the referenced memos.

On March 6, 1974, the FAA issued an Airwothiness Directive. Investigation into the crash led the FAA to conclude that federal law had been violated in the manufacture of the plane. The Federal Aviation Act of 1958 provided in section 901(a) that civil penalties of up to $1000 per violation may be assessed and enforced via suit in the federal district court. The Act also allows the Administrator to compromise such penalties, without the necessity of an admission of guilt. Douglas' check for $2000 was accepted in full compro-

mise and settlement, without an admission of guilt.

Since then, the FAA has been authorized to collect larger fines, but:

> "Increasing fines is not enough. Structural reform of this often neglected area of aircraft certification must be implemented, and sanctions must be used which can not be turned into 'license fees' by manufacturers as can even large fines." A THOROUGH CRITIQUE OF CERTIFICATION OF TRANSPORT CATEGORY AIRCRAFT BY THE FEDERAL AVIATION ADMINISTRATION, May 7, 1980, SIXTEENTH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS, Page 39. *(emphasis added)*

The Legislature, by special committees, conducted investigations and held hearings in both the Senate and House of Representatives. They produced two extensive transcripts of prepared statements and questioning on the preventability of this disaster. The Committee on Government Operations, whose members would not be necessarily privy to Addenda "A" and "B", took the above position based upon the apparent

frustrations of the FAA. See Report, *id.*

Neither the FAA, nor any of the investigative committees, uncovered anything which predicted the crash with the written precision of Addenda "A" and "B". Those documents were not produced until late in the discovery process under the supervision of the late Peirson. M. Hall, Senior District Judge.

Executive action, by governmental authority, has apparently been completed with the $2000 fine. It is unlikely that action would be initiated more than seven years after the crash.

The FAA did collect a $300,000 fine *("a tenth of one percent of the value of the affected aircraft")* from one of these manufacturers in connection with a subsequent crash in Chicago, some facts of which may be relevant for impeachment if there were ever a trial in this case.

The Judicial branch of the United States, with diversity jurisdiction, has consolidated all of the 346 death cases into one Multidistrict Litigation proceedings in the Central District of California. Under that court's supervision, nearly all of the insurance proceeds, $62,286,780+ plus hull payment, have been distributed to the more than 1100 claimants and their attorneys by settlement. There were only three jury verdicts for compensatory damages,[1/] and no one has been permitted to introduce any evidence of liability, either for compensatory damages or for the exemplary purpose of stopping planned plane crashes.

[1/] Jury verdicts:
The Kween case: $1,500,000; appealed and settled for $ *(unknown)*.
The Kalinsky case: $25,000; appealed and settled for $75,000.
The Nagao case: $287,000.

The defendants in this case moved to strike claims of punitive liability based upon the rule first announced in Lange v. Schottler, 115 Cal. 388 (1896), that exemplary damages could no longer be recovered in wrongful death actions. The plaintiffs were shocked to learn that the wrongful death act contained a hidden limitation, and the punitive liability statutes contained special exemptions, not on the face of the statutes, which favor only such defendants who engage in prohibited conduct and thereby take life: *to kill.*

The two District Court Judges appointed to the case, on February 10, 1977, signed an opinion to the effect that the distinction against punitive liability in death cases, if such may be established in non-death cases, is

unconstitutional, as a violation of the equal protection of the law. The District Court's opinion came after nearly three years of pretrial hearings during which it supervised this case. It certified its opinion for interlocutory appeal which the two manufacturing defendants brought before the Court of Appeals for the Ninth Circuit - before trial and before the introduction of any evidence on the issue of liability.

Counsel for those two defendants brought emergency motions before the Court of Appeals to have the brief of the Kalinsky appellees stricken and sealed. They finally stipulated to having it sealed before the court as part of an augmented record. See Appendix "D", "E" and "F".

The Court of Appeals panel, explicitly refusing to weigh the historical and policy arguments (fn.2 of the Opinion), advanced in appellees' sealed brief, reversed the District Court's opinion and remanded the case for further proceedings without a trial on liability.

The within Petition for Writ of Certiorari seeks this Court's review of an important question: Can the law constitutionally shield wrongful death defendants from liability beyond the insurance they purchase for their victims' lives? Conversely, can the law constitutionally deprive wrongful death plaintiffs of standing to establish the cause of their damages and seek, by example, to prevent the recurrence of such damages to themselves and to others?

IX

REASONS FOR ALLOWING THE WRIT

1. "FAIR COMPENSATION"

The Opinion confused the issues of compensatory liability and punitive liability. The corporate defendants were well insured and relatively immune from compensatory liability beyond the insurance premiums they purchase. The only real liability for them is punitive.

Can a defendant who kills, intending the insurance proceeds to pay "fair compensation"[2/] escape personal liability solely because his intended victim died?

If "fair compensation" is less than the cost of "corrective action", and the death distinction provides a sealed record and no liability trial, then how many planned plan crashes can we expect?

[2/] Opinion at pages 5 and 6.

2. SURVIVING VICTIMS

The Opinion did not recognize that the surviving victims, the claimants who have been bereaved of their loved ones, are victims of the plane crash in which they lose a family member.

The surviving victims of this plane crash had no say in whether their family members' lives would be liquidated with payment of "full compensation for loss[3/] of companionship and financial support." If there is any innocence beyond that of one boarding a plane, it is that of the relative left behind only to learn what it means to be a surviving victim.

To deprive surviving victims of the right to a trial on liability is to create an open season on the lives of plane passengers and the surviving victims.

[3/] Opinion at page 5, line 17.

The fact of insurance is a cold blanket for the loss of a loved one; all the more chilling to know that the plane crash was apparently preventable and there will be no liability trial - for the sole reason of death.

3. THE COURT'S POWER

The Court of Appeals did not recognize its own power to control any jury awards of punitive damages. The danger of extreme awards, and awards not based upon the evidence and the requisite elements of punitive liability, are subject to judgment NOV, remittitur and other judicial discretions such as admissibility of evidence under Rule 403 of the Federal Rules of Evidence. Such control exists at the trial court, and on appeal, as far as any party wishes to proceed.

4. REMEDIAL STRAIGHTJACKET

The panel straightjacketed itself into ignoring the difference between decedents and surviving victims. [4/]

Each are victims in their own right.

The decedents' rights are administered through the decedents' estates, under California Probate Code § 573, and that is the end of the decedents.

The rights of the surviving victims are recognized through California Code of Civil Procedure § 377. They are recognized as a kind of injury to the person under Code of Civil Procedure § 29. In that they do not arise from breach of contract, Civil Code § 3294 does not, on its face, prohibit punitive liability.

The death distinction arises from judicial interpretation, and misinterpretation, of the statutory scheme.

[4/] Opinion at page 12, lines 3 - 8.

5. STRICT SCRUTINY

The panel refused to apply the principles of strict scrutiny to this judicially created distinction, under either the California or the United States Constitutions. After discussing what might happen if a plaintiff were allowed to sue for punitive damages with no requirement of causation or injury, the panel refused to recognize the history and policy of the statutory scheme.[5/]

If it had, it would have seen that the statutory scheme exists not just for "fair compensation" but for deterence beyond compensatory liability. Sealed brief, pp. 45,66.

The deterent aspect of Civil Code § 3294, when coupled with Code of Civil Procedure § 377, is an apparent civil mandate for the respect of life. See Civil Code § 4.

[5/] Opinion at page 9 and fn. 2.

6. STATE STANDARD

The panel misplaced its reliance upon Justus v. Atchison, 19 Cal.3d 564, 582, 139 Cal.Rptr. 97,109, 565 P.2d 122, 134 (1977). That case determined whether an unborn fetus is a decedent within the meaning of Code of Civil Procedure § 377 for the purpose of recovery of damages thereunder. The California equal protection standards were applied only in terms of the identity of the decedent and not in terms of punitive liability for the killing itself.

Nothing in Justus shows the conclusion of the district court judges to have been clearly erroneous, as implied in the Opinion at page 3, lines 8 - 14.

The Opinion at page 10 cites Justus for the proposition that the legislature had a goal of "placing reasonable limits on wrongful death actions in this state."

Justus may stand for the proposition that it was reasonable for the legislature to require a live birth precedent to wrongful death. Justus does not stand for the proposition that all limitations on wrongful death actions are *per se* reasonable. Nor does it stand for the proposition that the goal of the legislature in enacting the wrongful death statute was generally to limit recovery to compensation for what was defined to be wrongful death.

Justus involved no punitive liability.

The panel's unprecedented reversal of District Judges Hall and Real, together who represent a magnitude of experience in California law, demands review.

See fn. 2 of the Opinion, pp. 14 & 15. Tarasoff, therein cited, involved no constitutional attack on the distinction.

7. FEDERAL STANDARD

The panel bootstrapped itself out of any form of rational basis test under the federal standard with its misapplication of Justus v. Atchison, *supra*. 6/

With its concern over "excessive liability", the Court of Appeals has upheld a death distinction which allows the defendants to escape with no real liability other than insurance premiums.

The federal government, after receipt of the maximum fine allowable for violations of Federal Aviation Regulations in connection with this plane crash, and after asserting its own immunity from punitive liability, now upholds the death distinction with a blind eye to any rational basis for its existence. It blatantly refused to apply the State standard to constitutional review of the distinction.

6/ Opinion, page 3, line 16, to page 4, line 22.

8. UNPREDICTABLE EFFECTS

The panel misplaced its reliance upon IBEW v. Foust, 442, U.S. 42,48-52 (1979).[7/]

If a defendant can plan plane crashes, meet its financial responsibility for compensatory damages with insurance, and escape any further civil liability for the sole reason that all on board die, "the serious and often unpredictable effects of allowing actions for punitive damages" would serve as no deterent at all to such a diabolic scheme.

Instead, based upon a fear of what might unfold at a trial on liability, the Court of Appeals has determined all wrongful death defendants in California to have no more civil responsibility than the payment of "fair compensation" to the surviving victims; even for murder.

We have nothing to fear, but the truth.

[7/] Opinion at page 5, lines 27-32.

9. EVIL CONSEQUENCES

The effect of the Court of Appeals Opinion and mandate that wrongful death defendants need not be subjected to a liability trial is to legally protect the insured killing of citizens of California, the United States and elsewhere.

It was ordered, and is settled,[8/] that the parties, and their attorneys and attorneys for amicus curiae, to the ensuing death cases will be the only persons legally privy to the documents and deposition testimony; that each of them will receive some money as "full compensation" or an attorney's fee; that any party or attorney who reveals testimony, documents or briefs sealed before the courts will be subject to contempt proceedings and "significant liability in contempt if indeed so."[9/]

Based upon the Opinion in question, potential defendants can consciously plan plane crashes for profit, and remain immune to civil liability beyond the insurance for compensatory damages -- but only if they successfully kill all who board the plane. *The lesson? mass annihilation!*

Defendants who would participate in a demonic scheme of this nature are now assured that they can consciously create disaster with immunity to civil liability; and that the courts will help them conceal their murderous acts.

They can nurture specific "catastrophic failure" modes, take out insurance, and go on with business, concealing the danger.

When disaster strikes, exactly as they knew it would, the defendants offer the insurance proceeds and offer not to contest liability so that fault issues will be legally irrelevant to "fair compensation."

And business goes on as usual with the now greatly escalated time costs of the risk spread among the defendants, *(via insurance premiums)*, the defendants' competitors, the surviving victims, and the general public.

They can keep track of premeditated disaster with written precision, knowing that the courts will respect their confidences with a sealed record.

To further secure the sanctity of such an unholy record, the courts will disallow a trial on liability where any evidence might be introduced to break the seal.

Under the Opinion in question, planned plane crashes can be profitable. The cost of repair is delayed and sometimes avoided. Each crash supports lucrative business for a small army of defense and plaintiff counsel. Each party and their counsel expect to be paid money for a release.

A sanction may be appied through the Federal Aviation Administration as the sole arm of the federal executive branch with jurisdiction over certification for airworthiness. The Congress has provided for the appointment of the Head of the FAA to guard the ramparts for citizen X. No one else has a right to know what is going on before the plane crash.

Thereafter, only the wrongful death claimants, through the discovery process of the judicial branch, begin to uncover the awful truth. The judicial branch blindly interprets the law to disallow punitive liability where the defendant has killed the claimant's decedent.

The court has no choice but to play an active role. The court has control of the discovery process and often can not close its eyes to the awful spector

of mass air disaster. It plays an active role in the distribution of the insurance proceeds which are paid through its trust accounts. It renders numerous opinions on technical issues and eventually closes the cases to make way for the neverending flow of plane crash business, never to look at the cause.

If it blindly interprets the law to disallow punitive liability where the defendant has killed the claimant's decedent, the court declines to play the role clearly demanded by California of its courts, and by Erie of a federal court.

If it looks the other way, its judges should be reminded that, while no corporation and no court ever died in a plane crash, the crash makes no distinction between the subtle variances of natural persons which the courts find more demanding of strict scrutiny.

footnotes ———————————————

8/ See Appendix items "D" and "E": orders of the Ninth Circuit Court of Appeals based upon proceedings initiated by defense counsel wherein counsel for each of the two defendants accused counsel for Kalinsky of being in contempt of court in connection with their brief in the appeal before that Court.

9/ Court of Appeals Judge Shirley Hufstedler noted an obvious First Amendment problem with the Emergency Motions brought before her. In an untranscribed chambers meeting, she did not reach the merits on the issue of contempt, "a potentially damaging position" after she had noted the possibility of "significant liability in contempt if indeed so." Counsel for Kalinsky, appearing alone, for any for the appellees' side, requestthe augmented record and stipulation.

10. PUBLIC INTEREST

The Court of Appeals frustrated the legislative intent apparent on the face of California's exemplary damages statute. Caifornia Code of Civil Procedure § 377, the wrongful death statute, makes no mention of any punitive liability limitation in death cases.

California's judicial pronouncements of the death distinction do not amount to an act of the Legislature. See Code of Civil Procedure § 1858.

The history of this judicially created distinction is shrouded in obscurity. First the California Supreme Court said that punitive damages were allowable in in all death actions, regardless of any real wrongdoing. Myers v. San Francisco (1871) 42 Cal. 215.

Then the Code Commissioners recommended the deletion of the words "pecuniary

and exemplary" from the wrongful death statute in an 1874 amendment intended more for the purpose of harmonizing the respective porvisions of the codes than for any other. The Report noted:

> "We have proposed to change many of these provisions so as to bring them into harmony with the law as heretofore existing and construed by our courts for nearly a quarter of a century. At the same time our attention has been called to defects which the last one or two years have for the first time made themselves apparent in laws which have stood on our statute books for many years; *and which we have endeavored to correct, making as little change as possible in the general frame of the statute.* * *"* *(italics added)*

The Report specifically noted:

> "Note - The object of the amendments in these two sections [the then existing wrongful death statute] is to make the sections correspond with each other and to designate with more precision the parties liable, and they cover all the cases mentioned in the original sections." Report of the Examiners of the Codes (1874). See the sealed brief of the Kalinsky appellees, pp. 34-36.

Twenty years after the amendment which deleted the words "pecuniary or exemplary", neither the defense attorney for a major corporation, nor a justice of the California Supreme Court, was aware of any intended change in the rule existing prior to the amendment:

In 1896, in Lange v. Schottler, 115 Cal. 388, a wrongful death case, the attorney for the defendant-appellant began his argument with the statement:

> "It was error for the court to instruct the jury that they could find exemplary damages, *as there was not evidence of malice sufficient to warrant any instruction as to exemplary damages.* "

The court then said in its opinion:

> "The statute of 1862 (Stats. 1862, p. 447) expressly allowed the jury to give exemplary damages, and this provision was carried into the first edition of the codes. It authorized such damages, pecuniary and exemplary, as the jury should deem just. In 1874 section 377 was amended by striking out the words 'pecuniary and exemplary.' *The purpose of this amendment must*

> *have been to take away the right to exemplary damages* and to make the rule accord with the general rule elsewhere."[it didn't say where]. Lange, *supra*, at 391-2. *(emphasis added)*

This questionable assertion of the legislative purpose became the foundation for a line of cases, upon which the respondents in this action rely. No cases in this line ever gave any rationale for the rule other than the blind citation of the previous cases back to Lange.

The court in Lange rewrote the statute to create a rule which was unknown to the Supreme Court justices in the previous cases of Munro v. Pac. Coast Dredging, 84 Cal. 515 (1890) and Morgan v. So. Pac. Co., 95 Cal. 510 (1892) and even to the defense counsel in Morgan and Lange, *supra*.

This is the first constitutional test of the distinction.

This barbaric distinction favoring death has appeared through history like a demon thriving upon disaster.

It quietly slides through the conscious recesses of the minds of those who wreak its deadly havoc. It makes killing profitable to the perpetrators, the survivors, and their attorneys. It lives under distinctions favoring death.

It is a misfortune that the courts play so active a role in these cases: and a double misfortune when they interpret the law to immunize death defendants from liability for the sole reason of mass annihilation.

Under the Court of Appeals Opinion in question, corporate defendants can premeditate plane crashes, and then step aside while their lawyers are paid handsomely to dicker with the surviving victims and their attorneys over the

economic remains of plane loads of people. The Opinion in question says they never have to face or reveal the evidence of their deadly acts.

These corporate defendants, creatures of the law, are physically immune from plane crashes, and the Opinion now says they are legally immune. In effect, they are free to reign beyond the last clutches of civilized society.

Everything has gone according to the plans secreted in the memos and the Failure Mode Effect Analyses. There was the loss of the plane, exactly as predicted, and all on board died because of the "catastrophic failure mode."

The defense attorneys routinely offered not to contest liability so that no issue of liability would be relevant to the determination of how much "fair compensation" should be paid.

Under the Opinion in question, the death defendant fairs well with a death distinction which says thou shalt kill to avoid liability and maintain secrecy.

Now, without a trial, we will not know whether the court-interpreted distinction is actually producing plane crashes, leaving the plans to be executed in corporate headquarters.

"Thou shalt not kill." has been given as the sixth commandment in Exodus 20:13. The verb originally used can only mean murder and always indicates intentional slaying.

Later, in a Sermon on the Mount:

> "Ye have heard that it was said by them of old, Thou shalt not kill and whosoever shall kill shall be in danger of judgment;
> But I say unto you that whosoever is angry with his brother without cause shall be in danger of judgment; and whosoever shall say to his brother [an abusive epithet] shall be in danger of the council; but whosoever

shall say, Thou fool, shall be in danger of hell fire.

Therefore, if thou bring thy gift to the altar, and there rememberest that thy brother hath anything against thee,

Leave there thy gift before the altar, and go thy way; first be reconciled with thy brother, and then come and offer thy gift.

Agree with thine adversary quickly while thou art in the way with him, lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison.

Verily I say unto thee, Thou shalt by no means come out from there till thou hast paid the uttermost farthing."

Matthew 5:21-26.

X

CONCLUSION

For these reasons, it is respectfully submitted that this petition should be allowed, and, in the Court's discretion, the case should be summarily remanded for trial on liability.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 2 1980
RICHARD H. DEANE
Clerk U.S. Court
of Appeals

In Re PARIS AIR CRASH of March 3, 1974 McDONNELL DOUGLAS CORPORATION, Defendant-Appellant, In Re PARIS AIR CRASH of March 3, 1974 GENERAL DYNAMICS CORPORATION, Defendant-Appellant, v. PLAINTIFFS IN MDL 172, Plaintiffs-Appellees.	Nos. 77-2099 77-2266 OPINION

Appeal from the United States District Court
for the Central District of California

Before: GOODWIN and KENNEDY, Circuit Judges,
and EAST, * District Judge.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

KENNEDY, Circuit Judge:

The single question in this interlocutory appeal is whether the California rule that punitive damages are not permitted in wrongful death actions is consistent with the equal protection clause of the fourteenth amendment and its counterpart in the state constitution. The question arises in the wrongful death actions that resulted from the Paris air crash of March 3, 1974. A DC-10 passenger plane operated by Turkish Airlines, Inc., was en route from Paris to London when it crashed, and all 346 people aboard were killed.

Wrongful death actions commenced in various districts across the country were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the Central District of California. The trial court held that California law would apply in determination of the suits and no objection to that ruling is made on this appeal. [1]

Many of the individual suits included claims for punitive damages based on allegations of intentional, fraudulent, or malicious conduct in the design, production, and certification of the plane. The defendants made, and renewed, motions to dismiss these claims and for summary judgment on them, arguing that California law did not provide for punitive damages in wrongful death actions. The district court denied the motions. In re Paris Air Crash of March 3, 1974, 427 F.Supp. 701 (C.D. Cal. 1977). The trial court acknowledged that California appellate courts have held punitive damages are not recoverable in wrongful death actions, [2]

but held that this restriction denied wrongful death plaintiffs, as compared to other tort plaintiffs, equal protection of the laws under the Federal and California Constitutions, U.S. Const. amend. XIV, § 1; Cal. Const. art. I, 2 7; id. art. IV, § 16(a).[3] The trial court's decision was certified for immediate appeal pursuant to 28 U.S.C. 2 1292(b) (1976). See 427 F.Supp. at 702 n.1, 710.

The trial court having based its ruling upon both the equal protection clause of the Federal Constitution and its counterpart under the Constitution of the State of California, we discuss the case in light of each of those provisions. As indicated below, the standard of review under the Federal Constitution may be less exacting than the one we must apply under California law. We find it appropriate to consider the federal claim first, noting that the analysis in each part of the opinion bears upon the other.

Appellees press our application of a principle that federal appellate courts will defer to a federal district court judge's interpretation of the law of the state in which he sits, absent clear error. See, e.g., Bishop v. Wood, 426 U.S. 341, 344-46 (1976); American Timber & Trading Co. v. First Nat'l Bank, 511 F.2d 980, 983 (9th Cir. 1974), cert. denied, 421 U.S. 921 (1975). We need not decide whether the decision below was clear error because it was rendered without the benefit of the California Supreme Court's subsequent decision in Justus v. Atchison, 19 Cal. 3d 564, 139 Cal.Rptr. 97, 565 P.2d 122 (1977). That decision clarified the analysis to be applied

under the California Constitution to the State's wrongful death statute.

Federal Constitutional Principles

The less difficult question before us arises under the Federal Constitution. If we find a rational relation between the statute and a legislative object, then the statute limiting tort liability is valid and no further or more exacting review is required. We think this rule follows from two recent decisions of the Supreme Court sustaining tort liability limitations. See Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 82-84, 93-94 (1978); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978). The damage limitations imposed on tort plaintiffs by the statutory classifications in those cases were more severe than the one at issue here. The laws in both cited cases limited the types or amount of compensatory relief payable, whereas California's wrongful death statute allows the full measure of such damages.

In Mobil Oil a certain class of plaintiffs was deprived of one type of compensatory damages altogether. There the dissent observed that

> [w]hen death arises from injuries occurring within a State's territorial waters, dependents will be able to recover for loss of society . . . . But once a vessel crosses the imaginary three-mile line, the seamen's dependents no longer have a remedy for an identical loss, occasioned by an identical breach of duty.

436 U.S. at 627 (Marshall, J., dissenting). By contrast, no such issue is presented here. Wrongful death plaintiffs in California are compensated for loss of society, as well as all other losses they personally suffer.

In Duke Power the court sustained a ceiling on aggregate liability for nuclear accidents. The amount was arguably arbitrary, but the Court held that the relations of the ceiling to the purpose of avoiding excessive liability for nuclear accidents was sufficiently close to sustain the statute. Avoidance of excessive liability is also the goal advanced in support of the limitation precluding punitive damages in wrongful death suits. See Justus v. Atchison, 19 Cal. 3d 564, 582, 139 Cal. Rptr. 97, 109, 565 P. 2d 122, 134 (1977), and discussion infra, pp. 10-11. We find this purpose is sufficient to sustain the validity of the statute under federal law, and that no more exacting review is required under the Federal Constitution.[4] A court should be quite certain of its ground before making a categorical finding that there is no permissible objective served by a state statute or that there is utterly no sensible or discernible relation between the legislature's classification and a legitimate end.[5] Such caution is proper because a finding of no state purpose reasonably advanced may indicate merely that a court finds the purpose less momentous than did the legislature.[6]

The court below decided the state statute violated the federal guarantee of equal protection only after subjecting the classification in question

to the strictest kind of scrutiny. I placed the burden of justification on the state. This was based on a determination that the "right to be free from oppressive, fraudulent or malicious conduct . . . is personal and substantially within the protections accorded fundamental rights found expressly and impliedly in the Fifth and Fourteenth Amendments to the United States Constitution." 427 F.Supp. at 708. (footnote omitted). We reject this reasoning. Its logic would apply to all areas of civil law in every state, and all civil remedies would be subject to the strictest standard of review. There is no authority for that proposition generally, and it is quite inappropriate in chis case. The plaintiffs, appellees here, are not without a remedy for personal losses sustained in fact. California's wrongful death statute allows full compensation for loss of companionship and financial support. Plaintiffs seek in addition, and as a matter of constitutional right, the opportunity to act as private attorneys general to effect the deterrence and retribution functions of section 3294 of the California Civil Code. So far is this opportunity from being a fundamental personal right that it is an interest not truly personal in nature at all. It is rather a public interest, and in defining who may give it effect the legislature should be given a broad discretion, similar to the discretion of a prosecutor. The clearly noncompensatory purpose and the serious and often unpredictable effects of allowing actions for punitive damages were elaborately discussed by the Supreme Court of the United States in IBEW v. Foust, 442 U.S. 42, 48-52 (1979). This distinction between compensatory and punitive damages explains why a court

will in general be less likely to hold unconstitutional a limit on the latter. See, e.g., Robert v. Ford Motor Co., 424 N.Y.S.2d 747 (App. Div. 1980). The case is therefore quite different from one in which the plaintiff has suffered a serious loss, be it a personal injury or the loss of companionship and financial support through the death of a relative, and is left with no effective remedy and thus no compensation for a grievous deprivation. In such cases, the courts have adopted remedial innovations through common-law power, see, e.g., Moragne v. States Marine Lines, 398 U.S. 375 (1970), or through application of equal protetection principles, see, e.g., Brown v. Merlo, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 509 P.2d 212 (1973); Dependents of Ondler v. Peace Officers Benefit Fund, 289 N.W.2d 486 (Minn. 1980) (limitation excluding only one class of persons unconstitutional and bears no relation to statute's purpose of providing additional benefits to dependents of peach officers killed in line of duty due to unusual risks of work). In this case, as we have noted, fair compensation is provided and the cases just cited are not controlling.[7] Cf. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (wrongful death statute that bars recovery for parent when child legitimate but not illegitimate makes irrational distinction). The principles of strict scrutiny do not apply, the statute is rational, and it is valid under the Federal Constitution.

B. California Constitutional Provisions

An understanding of the federal equal protection clause peripherally informs the following

analysis of its analog in California's Constitution.[8] Although the latter is in many respects similar to the former, see D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 16-19, 112 Cal.Rptr. 786, 797-99, 520 P.2d 10, 21-23 (1974), the state courts find it "possessed of an independent vitality," Serrano v. Priest, 18 Cal. 3d 728, 764, 135 Cal. Rptr. 345, 366, 557 P.2d 929, 950 (1976).[9]

Notwithstanding the authority of the state courts to rest judicial invalidation of a statute such as the one before us upon the provisions of the state constitution alone, the California Supreme Court in two significant cases has invalidated limits on tort recovery in ostensible reliance upon both the federal equal protection clause and its state counterpart. See Cooper v. Bray, 21 Cal.3d 841, 148 Cal. Rptr. 148, 582 P.2d 604 (1978); Brown v. Merlo, 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973). These cases deserve examination in the context of the issue before us here. We think they are distinguishable because the presented tort limitations that restricted damages in respects that differentiate them quite broadly from the statute before us.

Both cases involved the guest statute. This limitation was more burdensome and anomalous than other limitations on recovery for four reasons. First, it denied a large class of persons any compensation at all for grievous physical injury. Second, it was based not on a contemporary justification, such as limiting recovery to reasonable amounts of damages personally suffered, but rather on vestigial analogies to the law of bailments. See Comment, The Common Law Basis of Automobile

Guest Statutes, 43 U. Chi. L. Rev. 798 (1976). Similarly, the guest statute was anomalous in that it explicitly created a dual standard of care to two passengers in the same vehicle. Third, guest statutes were generally thought to be irrational and vestigial, see W. Prosser, Handbook of the Law of Torts 383 (4th ed. 1971), whereas the National Conference of Commissioners on Uniform State Laws has recommended as an option a limitation identical to the one challenged here. Model Survival and Death Act § 3(e) & Commissioners' Comment (1979). A provision about which "there is room for difference in opinion" is by very definition not a provision that is conclusively irrational as a matter of constitutional law. Fourth, the cause of action judicially altered in Brown and in Cooper is a common-law cause of action in origin, although it was the subject of a statute, and the cause of action in the case before us is viewed by many as wholly statutory. Courts traditionally have played a more active role in developing the former type of action. Cf. Justus v. Atchison, 19 Cal. 3d 564, 580-81, 139 Cal Rptr. 97, 108, 565 p.2d 122, 133 (1977) (legislature has wide discretion in creating new remedy such as wrongful death). The distinctions are such that we do not find that the reasoning of cited significant California cases controls the question before us.

The principal argument of the district court, in its reliance on both the federal and state constitutions, was that the punitive damage limitation is irrational because it permits damages for injury to property while prohibiting punitive damages for death of a person in the same accident.[10] 427 F. Supp. at 706. The use of the phrase "punitive

damages" as a unitary and undifferentiated concept to describe injuries to both property and person obscures an important point. In California as elsewhere the amount of punitive damages must be proportional to the amount of compensatory damages. See, e.g., Allard v. Church of Scientology, 58 Cal. App. 3d 439, 452-53, 129 Cal. Rptr. 797, 805-06 (1976). Assimilating a punitive damage award for the destruction of property to the enormously greater punitive damages likely to be awarded for the death of a person, and suggesting that the presence of one ought automatically to import the other, is more effective rhetorically than it is logically.

There is a further consideration. The fact that it is the conduct of the actor, and not the injury suffered, which is the principal focus of the statute, detracts substantially from the argument that parity or proportion of recovery for every kind of injury must be maintained. Once a civil duty has been breached in a malicious and outrageous way, it is in a sense irrelevant to the punitive and retributive purposes of the damage statute to require any injury at all as a condition to recovery. A scheme motivated purely to achieve deterrence and retribution at all costs would be one of absolute liability with no requirement of causation or injury. This is indeed true of many criminal statutes, but even this is tempered by prosecutorial discretion. The logic of plaintiffs' insistence that no limitation is valid unless it is related to deterrence and punitive goals just as forcefully would require us to rule that an injury requirement is wholly irrational and has nothing to do with the propriety of punitive damages.

Punitive damages are a hybrid of the civil and the criminal law.[12] The element of arbitrariness in part stems from the inevitable amalgam. On the one hand, it is reasonable for the state when it authorizes private plaintiffs as deputies to bring suits expressing social condemnation and disapproval to place some limits on the plaintiffs' standing. On the other hand, arbitrariness of a different sort is inevitable when one considers two plaintiffs suffering identical traumatic injuries in two different accidents, one through negligence, the other through malice. Though physically and emotionally their ordeals may be the same, the former is in some sense disadvantaged in comparison to the latter in that he cannot multiply his recovery through a punitive damages award.[13]

In short, it is necessary to bear in mind that the reasons and rules of a remedial law directed generally toward compensation cannot be transferred unthinkingly to examine remedies of a very different kind. These observations are made not only to buttress our view of the closeness of fit between the ends and the means of the statutory scheme in question, but also to make clear that the result we reach is not the product of mere mechanical manipulation of equal protection formalism under the rational relationship test.

We think that the application of equal protection under the California Constitution requires that the classification, in a case such as the one before us, must advance a discernible purpose in a rational manner.[14] We hold that the punitive damage limitation is constitutional in this respect. The purpose

of section 377 is "to enable the heirs and certain specified dependents of a person wrongfully killed to recover compensation for the economic loss and deprivation of consortium they suffer as a result of the death." Justus v. Atchison, 19 Cal. 3d 564, 581-582, 139 Cal. Rptr. 97, 108-09, 565 P. 2d 122, 133-34 (1977). Another goal of the statute is "placing reasonable limits on wrongful death actions in this state." Id. Disallowance of punitive damages serves this goal at least to some extent: it does reduce the kinds and therefore the total amounts of claims, and it also preserves the purely compensatory nature of the cause of action.

The case of Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974), illustrates the abrupt upward rise that wrongful death awards might take if punitive damages were allowed. For the deaths of four persons who died in a plane crash, the jury awarded over $4,000,000 compensatory damages and over $17,000,000 punitive damages. Id., 38 Cal. App. 3d at 454, 113 Cal. Rptr. at 419. The frequently violent and dramatic circumstances of accidents that lead to wrongful death actions not only would pose this danger of extreme awards, but also might increase the temptation for a jury to award punitive damages even when concrete elements of fraudulent or intentional wrongdoing are absent.

The limitation also advances the purposes of the survival and punitive damages statutes. In so stating it is important to note the contrast in remedies of the two enactments. The survival statute is best understood as a matter of probate

law, not tort law. Its goal is to insure that the estate of a decedent loses no valuable rights possessed by him during his life by reason of his death, whether these rights arise from tort, contract, or other principles. It is fortuitous, but hardly unconstitutional, that the legal consequences of an event differ depending on whether it occurs just before or just after death. See, e.g., Guyton v. Phillips, 606 F.2d 248 (9th Cir. 1979) (complaint does not state cause of action because conspiratorial acts allegedly violating 42 U.S.C. §§ 1983, 1985 occurred immediately after defendants shot and killed decedent); cf. Justus v. Atchison, supra (wrongful death statute makes fatal injury actionable one minute after fetus is born, but not one minute before, held rational and constitutional). Put differently, it would be the essence of a remedial straitjacket for a court to hold that a legislature cannot constitutionally provide for the survival, in spite of decedent's death, of claims he acquired before death, without simultaneously providing for the creation, because of his death, of a new claim acquired at the instant of death.

There is a second reason for finding the purpose of the punitive damage provision served by allowing punitive damages in survival actions and personal injury actions but not in wrongful death actions. In its own words, section 3294 of the California Civil Code is to effect punishment and deterrence. The deterrence is sharpest and the punishment best focused when there is a payment directly from the tortfeasor to the victim, the latter being the person most directly involved in the accident and best in a position to judge the culpability of the defendant, and therefore the one

to whom payment by the tortfeasor signifies punishment in the most precise form. See 4 B. Witkin, Summary of California Law § 853 (8th ed. 1974).[15]

For the foregoing reasons we find that California's disallowance of punitive damages is wrongful death actions violates neither the Federal Constitution nor the California Constitution.

The judgment below is REVERSED and the case is REMANDED for further proceedings.

FOOTNOTES

1/ The two state causes of action granting recovery for death are:

> § 573. Actions by or against executor or administrator; recovery of damages; death of plaintiff before judgment; simultaneous death
>
> Except as provided in this section no cause of action shall be lost by reason of the death of any person but may be maintained by or against his executor or administrator.
>
> In an action brought under this section against an executor or administrator all damages may be awarded which might have been recovered against the decedent had he lived except damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.
>
> When a person having a cause of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived, and shall not include damages for pain, suffering or disfigurement.

This section is applicable where a loss or damage occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not preceded or occurred simultaneously with the loss or damage.

Nothing in this section shall be construed as making assignable things in action which are of such a nature as not to have been assignable prior to the enactment of the 1961 amendment to this section.

Cal. Prob. Code § 573 (West Supp. 1979).

§ 377. Wrongful death; right of action; damages; consolidation of actions

(a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action

under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

Cal. Civ. Proc. Code § 377 (West Supp. 1979).

The plaintiffs have, by stipulation, forsaken any opportunities they may have had to recover punitive damages under the survival statute, § 573, such as by theories accepted in Stencel Aero Eng'r. Corp. v. Superior Court, 56 Cal. App. 3d 978, 985-88, 128 Cal.Rptr. 691, 694-97 (1976), and Dunwoody v. Trapnell, 47 Cal. App. 3d 367, 120 Cal. Rptr. 859 (1975). See 427 F.Supp. at 702 n.1(f), 703 n.2. The propriety of raising an equal protection challenge grounded on an adverse comparison between one statute plaintiffs rely on and another they could possibly have relied on but chose not to, is questionable, but the argument does not

influence our decision in any event.

For a discussion of the relation between the two causes of action, see Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 591-95 (1974); II S. Speiser, Recovery for Wrongful Death 408-11 (2d ed. 1975). See also Malone, The Genesis of Wrongful Death, 17 Stan. L. Rev. 1043 (1965).

Exemplary damages are governed by the following provision:

§ 3294. Exemplary damages; when allowable

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Cal. Civ. Code § 3294 (West 1970).

2/ California courts have uniformly held that the statute allowing punitive damage recoveries generally in tort actions is available for death recoveries only in survival actions and not in wrongful death suits. See e.g., Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 33, 551 P.2d 334, 353 (1976); Pease v. Beech Aircraft Corp., 38 Cal App. 3d 450, 113 Cal. Rptr.416 (1974); Note, 15 Santa Clara Law.

Various briefs filed for plaintiffs-appellees advance plausible historical and policy arguments to the effect that this limitation is unnecessary or incorrect as a matter of statutory interpretation. The arguments would be germane if made to the California Supreme Court, but we are not in a position to weigh them. We are bound to follow that court's 1977 holding to the contrary in Tarasoff. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The correctness of Tarasoff's statutory interpretation is supported by the legislature's failure to amend § 377 to include punitive damages despite attention having been drawn to their omission.

3/ The relevant sections of the California Constitution are:

> Due process and equal protection; pupil school assignment or transportation; privileges and immunities
>
> Sec. 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. . . .

Cal. Const. art. I, § 7 (as amended, 1974, 1979);

> Uniform operation of laws; local or special laws
>
> Sec. 16. (a) All laws of a general nature have uniform operation.

id., art. IV, § 16 (a) (as amended, 1974).

4/ We do not apply a middle-tier analysis for three reasons. First, both state and federal Supreme Courts have declined frequent invitations to announce or articulate such an analysis. Second, both courts have analyzed tort recovery limits in terms of its rational bearing upon a legislative objective. Third, the relatively nongrievous deprivation, if indeed it can be called such, of a limit on who may act as a private attorney general by seeking punitive damages makes this case particularly inappropriate to inaugurate such an analysis. Additional drawbacks of this proposed innovation are discussed in Hawkins v. Superior Court, 22 Cal. 3d 584, 607-10, 150 Cal. Rptr. 435, 450-51, 586 P.2d 916, 931-32 (1978) (Bird, C.J., concurring); Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976).

5/ Judicial restructuring of a matter as complex as the incidence and effects of punitive damages would be especially prone to unforeseeable error. See generally Breit & Elzinga, Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages, 17 J. L. & Econ. 329 (1974) (complex analysis necessary to evaluate utility of exemplary damages in one area of civil law); Note, State Economic Substantive Due Process: A Proposed Approach, 88 Yale L. J. 1487, 1492-94 & n. 26, 1508-10 & n. 88 (1979) (judicial alteration of economic legislation may be dysfunctional).

6/ See, e.g., Washington v. Confederated Bands and Tribes, 439 U.S. 91979) (reversing appellate holding "checkerboard" jurisdictional allocation wholly arbitrary and irrational).

7/ This point also serves to distinguish the recent decision of the California Court of Appeal in American Bank & Trust Co. v. Community Hospital, 104 Cal. App. 3d 219, 163 Cal. Rptr. 513 (1980), in which the court invalidated a medical malpractice recovery limitation. The limitation restricted the amount of compensatory damages that were recoverable. Additionally, the effect of the law was somewhat discriminatory, in that one particular class of tortfeasors -- those guilty of medical malpractice -- was benefited at the expense of a narrower class of plaintiffs -- those injured by medical malpractice.

8/ See note 3, supra.

9/ The California equal protection guarantee, while structurally similar to the federal, has on occasion been applied differently in that some interests or categories are considered fundamental or suspect under the former but not the latter. See, e.g., Serrano v. Priest, 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 (1976); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529, 538-43 (1971). In addition, when an interest is important but not "fundamental," the more deferential mode of equal protection analysis may be applied by California courts in a somewhat stricter fashion than usual, by requiring a closer fit between ends and means than is the

norm. Compare Cooper v. Bray, 21 Cal. 3d 841, 148 Cal. Rptr. 148, 582 P.2d 604 (1978) (limitation on tort cause of action unconstitutional) with Justus v. Atchison, 19 Cal. 3d 564 139 Cal. Rptr. 97, 565 P.2d 122 (1977) (limitation on tort cause of action constitutional); cf. pp. 7-8 infra (discussing why unusual nature of guest statute elicited particular constitutional scrutiny in Cooper). It may be a significant distinction between the two decisions just cited that Cooper involved a common-law, and Justus a statutory, cause of action.

10/ The trial court formulated a hypothetical illustration to demonstrate the law's alleged irrationality. See 427 F.Supp. at 706. The hypothetical facts, briefly, are a defendant's willful and reckless driving, and his colliding with a family car, thus killing two passengers, and causing other personal injuries and property damage. The trial court considered it a paradigm of unreason that California law "would permit the recovery of punitive damages as well as compensatory damages for injury [to property and non-fatal bodily injury] . . . but would not sanction the recovery of punitive damages for the death of either the mother or the father . . . ." Id. The particulars of this hypothetical would be less important if they did not embody the core of criticism nearly uniformly directed at the limitation at issue here. See, e.g., McClelland & Truett, Survival of Punitive Damages in Wrongful Death Cases, 8 U.S.F.L. Rev. 585 (1974); Note, Punitive Damages in Wrongful Death, 20 Clev. St. L. Rev. 301 (1971). As the entirety of our discussion indicates, we believe that the

basis of these criticisms of the limit prohibiting punitive damages is unsound.

11/ See Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U.L. Rev. 1158, 1168-69 (1966).

12/ See generally Note, Punitive Damages Under Federal Statutes: A Functional Analysis, 60 Calif. L. Rev. 191 (1972); Note, supra note 11.

13/ Cf. Rabin, Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System, 30 Stan. L. Rev. 281, 297 (1978) (noting that even where punitive damages recoverable, arbitrary factors may govern their award).

14/ This is a synthesis of the California Supreme Court's various formulations of the applicable state equal protection standard. See, e.g., Cooper v. Bray, 21 Cal. App. 3d 841, 855, 148 Cal. Rptr. 148, 156, 582 P.2d 604, 612 (1978) (serious and genuine inquiry into correspondence between statute's goals and classifications); Justus v. Atchison, 19 Cal. 3d 564, 581, 139 Cal. Rptr. 97, 108, 565 P.2d 122, 133 (1977) (classification will be upheld unless beyond rational doubt arbitrary discrimination between similar classes made without reasonable cause); Brown v. Merlo, 8 Cal. 3d 855, 861, 106 Cal. Rptr. 388, 392, 506 P.2d 212, 216 (1973) (classification must rest upon difference having fair and substantial relation to object of legislation) (borrowing standard from U.S. Supreme Court's gender cases); Note,

Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence, 21 U.C.L.A. L. Rev. 1566, 1569-86 (1974).

15/ It is not unreasonable to assume that the person best in a position to judge the culpability of a defendant, and thus the propriety of suing for punitive damages, is the person most directly involved in the accident or invasion of right, namely, the victim himself. This accounts for allowing punitive damages in personal injury actions, where the victim is the plaintiff, and in survival actions, where by hypothesis the victim survives the accident and may survive long enough to give his heirs and representatives his own account of the tortious occurrence, but not in wrongful death actions such as in the case before us where the victim's death is nearly instantaneous. See generally Note, supra note 12; Note, supra note 11.

16/ In so holding we join other courts which have determined that similar limits on wrongful death statutes do not violate the federal guarantee of equal protection of the law. See Huff v. White Motor Corp., 609 F.2d 286, 298 (7th Cir. 1979); Cyr v. B. Offen & Co., 501 F.2d 1145, 1148 n.2 (1st Cir. 1974); Johnson v. International Harvester Co., Civ. No. A3-79-224 (D.N.D. Apr. 9, 1980).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 29 1980
RICHARD H. DEANE
Clerk U.S. Court of Appeals

In re PARIS AIR CRASH of March 3, 1974 McDonnell Douglas Corporation, Defendant-Appellant, In re PARIS AIR CRASH of March 3, 1974 General Dynamics Corporation, Defendant-Appellant, v. PLAINTIFFS IN MDL 172 Plaintiffs-Appellees.	Nos. 77-2099 77-2266

Before: GOODWIN and KENNEDY, Circuit Judges, and EAST, * District Judge.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The panel as constituted in the above case has voted to deny the petitions for rehearing. Judges Goodwin and Kennedy have voted to reject the suggestions for a rehearing en banc, and Judge East has recommended rejection of the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for a rehearing en banc are rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
11 AUG 1980
RICHARD H. DEANE
Clerk U.S. Court of Appeals

In Re PARIS AIR CRASH of March 3, 1974 McDONELL DOUGLAS CORPORATION, Defendant/Appellant In Re PARIS AIR CRASH of March 3, 1974 GENERAL DYNAMICS CORPORATION, Defendant/Appellant, vs. PLAINTIFFS IN MDL 172 DORIS LEAH KALINSKY, et al., Plaintiffs/Appellees.	) No.) 77-2099) 77-2266) DC CV) MDL 172) PH & MLR

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41 (b) Fed.R.App.P.)

Upon due consideration of appellees motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme

Court of the United States on or before September 06, 1980,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

s

United States Circuit Judge
KENNEDY

*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re PARIS AIR CRASH of March 3, 1974 McDONNELL DOUGLAS CORPORATION, Defendant-Appellant.	NO. 77-2099 NO. 77-2266
In Re PARIS AIR CRASH of March 3, 1974 GENERAL DYNAMICS CORPORATION, Defendant-Appellant, vs. PLAINTIFFS IN MDL 172, Plaintiffs-Appellees.	(C.D. Cal. No. MDL-172-PH&R) ~~PROPOSED~~ ORDER

Pending the filing of a stipulation by the parties and

Good cause appearing therefor, it is hereby ordered:

1. The brief of appellees Doris Leah Kalinsky and Sol Kalinsky which has been filed in the above-captioned actions is ordered sealed.

2. The attorneys of record for appellees Doris Leah Kalinsky and Sol Kalinsky shall collect all copies of said brief which have been delivered to any person other than a party to this appeal, one of the attorneys of record for a party to this appeal, the United States Court of Appeals for the Ninth Circuit or the United States District Court for the Central District of California.

3. All parties to this appeal and their a attorneys of record are ordered to obey the order concerning disclosure of deposition testimony and exhibits which were signed by the Honorable Pierson M. Hall on January 17, 1975;

4. The parties to this appeal and their attorneys of record are ordered not to give a copy of the brief of the appellees Doris Leah Kalinsky and Sol Kalinsky to any person who is neither a party to this appeal nor one of the attorneys of record for a party to this appeal. The parties and their attorneys are further ordered not to allow any person who is neither a party nor an attorney of record for a party to read or copy any portion of said brief.

5. This order shall remain in force and effect until dissolved or modified by further order of this court.

DATED: June 15, 1978

s

Shirley M. Hufstedler
United States Circuit Judge

APPENDIX E

RECEIVED
JUN 16 1978
NOBLE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re PARIS AIR CRASH of March 3, 1974 McDONNELL DOUGLAS CORPORATION, Defendant-Appellant	NO. 77-2099 NO. 77-2266
In Re PARIS AIR CRASH of March 3, 1974 GENERAL DYNAMICS CORPORATION, Defendant-Appellant, vs. PLAINTIFFS IN MDL 172, Plaintiffs-Appellees.	(C.D. Cal. No. MDL-172-PH&R) ~~PROPOSED~~ ORDER

Good cause appearing therefor, it is hereby ordered:

1. The brief of appellees Doris Leah Kalinsky and Sol Kalinsky which as been filed in the above-captioned actions is ordered sealed.

2. The attorneys of record for appellees Doris Leah Kalinsky and Sol Kalinsky shall collect all copies of said brief which have been delivered to any person other than a party to this appeal, one of the attorneys of record for a party to this appeal, attorneys for amicus curiae, the United States Court of Appeals for the Ninth Circuit or the United States District Court for the Central District of California.

3. All parties to this appeal and their attorneys of record and the attorneys for amicus curiae are ordered to obey the order concerning disclosure of deposition testimony and exhibits which was signed by the Honorable Peirson M. Hall on January 17, 1975.

4. The paraies to this appeal and their attorneys of record and the attorneys for amicus curiae are ordered not to give a copy of the brief of the appellees Doris Leah Kalinsky and Sol Kalinsky to any person who is neither a party to this appeal nor one of the attorneys of record for a party to this appeal nor an attorney for amicus curiae. The parties and their attorneys and the attorneys for amicus curiae are further ordered not to allow any person who is neither a party nor an attorney of record for a party nor an attorney for amicus curiae to read or copy any portion of

said brief.

5. The record on appeal is ordered augmented to include the memoranda which are included in the Kalinsky brief as addenda "A" and "B". All copies of these memoranda which are now or might in the future be filed with the Court of Appeals of the Ninth Circuit are ordered sealed. This paragraph does not preclude appellants General Dynamics Corporation and McDonnell Douglas Corporation from making a motion to strike the memoranda from the record and from the Kalinsky brief. This paragraph is not a decision on the merits of the argument about whether or not the memoranda should be contained in the record on appeal or included or referred to in the Kalinsky brief.

6. If appellants General Dynamics Corporation and McDonnell Douglas Corporation prevail on a motion to strike the memoranda and the "Statement of Facts" appearing on pages one through six of the Kalinsky brief, the Kalinsky appellees may refile the brief, absent the stricken portions without further change. In any event, the Kalinsky appellees shall not be precluded from rewriting those portions of the brief that are stricken in a manner that is consistent with the ruling of the court.

7. The appellants, General Dynamics Corporation and McDonnell Douglas Corporation have agreed not to seek sanctions against either the Kalinsky appellees or their attorneys by reason of the inclusion of the memoranda and mention of them in the Kalinsky brief.

8. This order shall remain in force and effect until dissolved or modified by further order of this court.

DATED:

s
Shirley M. Hufstedler
United States Circuit Judge

DATED: June 16, 1978

s
David Noble
Attorney for Plaintiff-Appellees
Kalinsky

DATED: June 16, 1978

TUTTLE & TAYLOR

By s
Stanley C. Fickle
Attorneys for Defendant-Appellant
McDonnell Douglas Corporation

DATED: June 16, 1978

OVERTON, LYMAN & PRINCE

By s
Gregory A. Long
Attorneys for Defendant-Appellant
General Dynamics Corporation

APPENDIX F

MENDES & MOUNT
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COPY
Copy for the Judge
RECEIVED
Jan 22 1975

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FILED
JAN 30 1975
Clerk, U.S. District Court
Central-District of California

Attorneys for Defendant
McDONNELL DOUGLAS CORPORATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re:	)	M.D.L. 172
PARIS AIR CRASH OF	)	All Cases
March 3, 1974	)	
	)	ORDER

WHEREAS, on August 6, 1974, this Court entered an order denying McDonnell Douglas Corporation's Motion for a Protective Order under F.R.C.P. 26(c) to prevent the release or

availability of the depositions and exhibits to any representatives of the press, except as to Item (6) of F.R.C.P. 26(c); and

WHEREAS, on December 2, 1974, in the case of Times Newspapers Limited (of Great Britain) v. McDonnell Douglas Corporation, et al., No. CV 74-2658-PMH, this Court ruled that the Federal Rules of Civil Procedure assure the sealing and privacy of depositions until ordered opened by the Court, and that the public can have no right to know what the deposition testimony in these cases is until the Court nows what it is; and

WHEREAS, based on the Affidavit of James R. FitzSimons, filed herein on January 15, 1975, and other good cause appearing to the Court, and for the purpose of enforcing the principles of sealing and privacy of depositions, and subject to further Order of this Court:

IT IS ORDERED:

(1) That, during the pendency of this litigation, no party to these actions, or officers, employees, agents or counsel of such party shall disclose to the press or other news media or to any person not directly interested in this litigation the testimony of any deponent in these actions; nor shall any person directly interested in this litigation to whom any such testimony is disclosed disclose to the press or other news media or to any person not directly interested in this litigation any such testimony;

(2) That the officer taking the deposition furnish copies thereof to no one except parties to these actions, or those who may become parties, and the deponent, if so requested, and their respective counsel, and that said persons permit no one not directly interested in this litigation to examine such copies;

(3) That, during the pendency of this litigation, no party to these actions, or officers, employees, agents or counsel of such party, shall disclosed to the press or other news media or to any person not directly interested in this litigation any document produced by any deponent or by any party to these actions or the content of any such documents; nor shall any person direct ly interested in this litigation to whom any such documents is disclosed disclose to the press or other news media or to any person not directly interested in this litigation any such document.

(4) That any person directly interested in this litigation to whom any such testimony or document is disclosed shall, before any such disclosure is made, be shown a copy of this Order;

(5) Solicitors, experts and technical advisors assisting parties and their counsel in this litigation shall for purposes of this Order be deemed persons directly interested in this litigation, and nothing in this Order shall prevent disclosure of any deposition testimony, documents or other information to appropriate courts, legislative committees or governmental investigative bodies in response to any appropriate request therefrom;

(6) Nothing herein shall be deemed a finding by this Court that disclosure has heretofore been made by any person in violation of any Order of this Court, or that any counsel of record herein has violated any Order of this Court or any stipulation of counsel;

(7) This Order shall be binding on all persons who may become parties to this litigation in the future, and on officers, employees, agents and counsel of such persons;

(8) The Affidavit of James M. FitzSimons, referred to herein, the exhibits attached thereto, the report's notes of the in camera proceedings relating to this Order, and the newspaper article submitted to this Court in chambers, shall remain sealed and remain in camera until further Order of this Court, and any transcript of such reporter's notes shall be subject to the terms of this Order.

DATED: January 17, 1975.

(PEIRSON M. HALL)
United States District Court Judge

STIPULATED AND AGREED:

For Plaintiffs Committee:

_____

ss_____

For Defendant and Plaintiff T.H.Y.:

_____

ss_____

for Defendant McDonnell Douglas Corporation:

ss_____

For Defendant General Dynamics Corporation:

ss_____

For Defendant United States of America:

ss_____